

14th March 2025

Chris Humphreys
Principal Policy Adviser
Policy & Outreach
Victorian Legal Services Board + Commissioner
By email: chumphreys@lsbc.vic.gov.au

Dear Chris,

VLSB+C Consultation response

Thank you for contacting me and for meeting with us recently.

As the peak national representative body for in-house lawyers, the Association of Corporate Counsel (ACC) Australia (**ACC Australia**) is comprised of seven divisions across Australia, including the ACC Australia Victorian Division (**ACC Victorian Division**). ACC Australia has more than 3,000 members and is part of the global Association of Corporate Counsel, which represents more than 47,000 in-house counsel in more than 100 countries around the world.

The ACC Australia Victorian Division appreciates the opportunity to provide the Victorian Legal Services Board + Commissioner (**VLSB+C**) comments on its consultation paper, “In-house Counsel: Regulatory Issues.”

VLSB+C notes at the outset that the purpose of this consultation is not “part of a wide-ranging analysis and investigation of the role of in-house counsel” However, to best understand the challenges in-house counsel face and provide support, VLSB+C should endeavor to cultivate a broader understanding of the in-house legal profession. To that end, we attach the 2025 Chief Legal Officer (CLO) Survey results with a focus on Australia, and we are happy to provide more information as may be of assistance.

General Comments

Many of the challenges identified in the consultation paper are not unique to in-house counsel. All lawyers face some pressure to deliver sound advice that will be favorably received by their clients.

Brussels
Melbourne
Washington, DC

Moreover, the professional obligations and duties owed to their clients are also the same. Both in-house counsel and private practitioners are officers of the court and, in Victoria, (defined as corporate solicitors) are subject to the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR)*. While information, guidance, and resources to help lawyers better comply with their responsibilities is welcome, the ACC Victorian Division encourages VLSB+C to avoid duplicating existing resources or over-complicating regulatory systems by introducing “in-house only” provisions that are substantially similar to the existing rules of conduct.

Comments on ethical challenges for in-house lawyers

1. Professional independence.

While in-house lawyers may have only one client, their employer (or related entity), there are a variety of factors that determine the independence of any lawyer, whether in-house or in private practice. For example, in-house lawyers lack some of the pressures faced by outside counsel – billing practices, significant overhead expenses, and reliance on a small number of large clients.

Some of the factors that contribute to an independent in-house lawyer include a reporting structure where the top legal officer reports directly to the CEO and has a consistent presence with the board of directors. For organizations with large legal departments, there are generally multiple points of escalation for concerns. Sole legal officers frequently take advantage of the networking and educational resources offered by organizations like ACC Australia, as well as ethics hotlines and support when ethical issues arise.

The ACC Victorian Division recommends support for all lawyers to speak up on ethical dilemmas, including training on the availability of ethics hotlines, whistleblowing, and other external resources. Additionally, communication aimed at clients, regardless of whether they are employers, is a helpful idea to ensure that clients understand that lawyers are officers of the court and carry obligations that rise above the employment contract or client requests.

2. Informal sources.

Knowledge of the business and its personnel strengthen, not weaken, an in-house lawyer's ability to represent their client. All lawyers should strive to know as much as they can about their clients – indeed, the full and frank exchange of information is the underlying justification for legal professional privilege, the oldest and most significant of the common law privileges. Additional information on this point may be helpful to better understand VLSB+C's concerns.

3. *Sole/Less Experienced Lawyers.*

We agree that being a sole in-house lawyer in an organization presents unique challenges as compared to being a lawyer in a large legal department. However, these challenges are not so dissimilar to lawyers in sole private practice. In both instances, lawyers should be encouraged to develop a network of peers, take advantage of mentoring programs, and attend education and training sessions designed for sole lawyers. The ACC Victorian Division serves this function for in-house counsel by offering a range of networks to members. These networks include New to In-House¹ and Sole Legal Officer² (colloquially referred to as “YOLO” (You’re the Only Legal Officer)).

It is also typical that sole in-house lawyers will engage external legal providers to advise on specialist or complex areas of law, as well as litigation and regulatory investigations.

The ACC Victorian Division is unfamiliar with an intentional practice of recruiting inexperienced lawyers for the purpose of allowing manipulation of the legal staff by the organization. In our experience, junior lawyers are usually recruited to support senior lawyers already on staff.

4. *Organizational governance arrangements.*

In-house counsel often play a significant and beneficial role in an organization’s corporate governance. Frequently, in-house lawyers serve as corporate secretaries and/or are tasked with ensuring the board, management, and employees are educated on the organization’s legal and compliance obligations. As such, they are a visible and present resource for the organization’s corporate governance systems. While the ACC Victorian Division advocates for the top legal officer to report directly to the CEO and have a consistent relationship with the board of directors, even in organizations that do not have this management structure, in-house lawyers report that they have strong relationships with management and the board and are able to provide independent legal advice.

5. *Legal Professional Privilege.*

In-house lawyers have a unique position when it comes to preserving legal privilege for two reasons. First, they are both the lawyer and client in privileged conversations – they are the lawyer for their organization, and when they retain outside counsel, they are also clients. Second, in-house lawyers may

¹ <https://www.acc.com/chapters-networks/chapters/australia/new-to-in-house>

² <https://www.acc.com/chapters-networks/chapters/australia/local-networks/sole-legal-officer>

be involved in more business strategy discussions than outside counsel, which may not be subject to legal professional privilege (**LPP**).

For private practitioners and in-house lawyers alike, it tends to be those with litigation experience who better understand and more commonly deal with matters of LPP. For lawyers less familiar with litigation, an understanding of LPP is not always straightforward and education and training on LPP is to be encouraged. ACC provides a wealth of resources and training to help its members navigate LPP issues.

At the Federal level, ACC Australia (through its Advocacy Committee – comprising a number of very senior and experienced in-house lawyers) participated in consultations with the Attorney-General Department (**AGD**) and Treasury, recently filing comments on a joint discussion paper concerning LPP in government investigations. From the beginning, both AGD and Treasury recognized the importance of LPP for all lawyers, including in-house lawyers, and that in-house lawyers in particular play an important role in ensuring the privileged nature of legal advice and discerning when advice is legal (and privileged) or business (and not privileged).

6. Improper Assertions of LPP.

The ACC Victorian Division is unfamiliar with the “co-opting” practice described to improperly assert LPP. While it is indeed common for non-legal employees in a business to misunderstand LPP, in-house lawyers employ a combination of education and training, as well as policies and procedures, to minimize the improper use of “confidential/privileged” labels or copying in lawyers in an attempt to attract LPP. Additionally, if in-house counsel believe litigation is anticipated, they will typically bring in outside counsel at an early stage to handle questions of LPP.

Questions of LPP can be complex and challenging for even barristers and private practitioners and can be misunderstood by all, including in-house counsel, as is seen by many interlocutory hearings on the topic.

7. Properly Identifying the Client.

All lawyers should be well-versed in the regulations that govern how to represent an organization. We consider that our members understand that their client is their employer or a related entity³.

³ ACC Australia has made submissions to the Legal Services Council (by letter dated 8 November 2019) requesting the definition of Related Entity to be broader to capture modern corporate practice and the wide array of corporate structures in today’s business world that require in-house counsel advice.

8. *Compartmentalizing legal and non-legal components.*

As noted above, in-house lawyers have several strategies to ensure that the organization's employees understand the in-house legal role. Education and training sessions, written policies and procedures, and clear communications all serve to alert employees to the different roles in-house counsel have and, when the lawyer is providing legal advice, the rules that govern those interactions. This is a well-trodden path for in-house lawyers and in the ACC Victorian Division's experience, its members tend to be very experienced in navigating such issues.

Challenges in regulating in-house lawyers

1. In-house lawyers do not operate in a vacuum – their actions, along with the actions of their client organizations, are subject to external audit and regulatory oversight, employee complaint processes and mandatory whistleblower⁴ mechanisms, as well as other guardrails. Moreover, Victorian in-house lawyers are also governed by ASCR and are officers of the court.
2. Illegal and unethical behavior can sadly appear in any organization. Nonetheless, the above-described regulations, ethics rules and consequences, and outside scrutiny all serve to curb bad behavior.
3. More information is needed about the specific regulatory powers VLSB+C is considering with regard to corporate workspaces. The ACC Victorian Division notes that the, VLSB+C has existing broad powers to seek document disclosure and interview lawyers.

Consultation questions

1. Guidance and support are always welcome, but the ACC Victorian Division urges VLSB+C not to duplicate existing efforts or resources. ACC Australia, law societies, and other organizations all have robust training, education, and networking resources. We would be glad to discuss further opportunities for collaboration with the VLSB+C on developing relevant existing and new resources to benefit in-house lawyers.

⁴ For example, ASIC information on whistleblowing regulation of companies by the *Corporations Act 2001*
<https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>

2. Over the last twenty years, there have been significant advancements in the understanding and appreciation of the important role in-house lawyers play in their organizations. Employers have a much-improved recognition of the in-house legal position, including the duties owed to the court and professional conduct. We are interested to learn more about the Solicitors Regulatory Authority's (SRA) pilot program and responses to that program from both lawyers and employers. ACC Victorian Division recognizes the benefit in some of the new SRA resources that have been made available, including to employers.

3. The ASCR apply regardless of whether the lawyer is in-house or in private practice. Because of the many similarities in practice between in-house and private practice lawyers, the ACC Victorian Division does not see value in making distinctions within the rule text as it currently stands. We would be happy to discuss this further.

4. It is the ACC Victorian Division's understanding that, perhaps outside of entering business premises, VLSB+C already has the ability to require document disclosure and lawyer interviews. Additionally, as described above, there are a host of federal and state agencies that do have searching authority. The ACC Victorian Division urges the VLSB+C to further explore whether a true need exists for additional investigatory powers, after taking into account all other government resources, before making any changes to the existing regulatory structure.

Thank you for the opportunity to share our views on this important topic. Please do not hesitate to contact the undersigned with questions or for additional information.

Yours sincerely
ACC Victorian Division

**Madder
Emily**

Digitally signed by Madder Emily
DN: cn=Madder Emily, c=DE,
o=Siemens,
email=emily.madder@siemens-
energy.com
Date: 2025.03.14 17:32:59 +11'00'

Emily Madder
Immediate Past President
Treasurer

Brussels
Melbourne
Washington, DC